istration or enforcement, dictated solely by considerations of race, runs afoul of the equal protection clause. *Yick Wo* v. *Hopkins*, 118 U.S. 356, 373-74 (1886); see *Snowden* v. *Hughes*, 321 U.S. 1, 8 (1944).

This court has not been insensitive to constitutional claims based upon race. See, for example, *Aaron* v. *Cooper*, 257 F.2d 33 (8 Cir. 1958), aff'd 358 U.S. 1; *Bailey* v. *Henslee*, 287 F.2d 936 (8 Cir. 1961), cert. denied 368 U.S. 877; and *Henslee* v. *Stewart*, 311 F.2d 691 (8 Cir. 1963), cert. denied 373 U.S. 902. "But purposeful discrimination may not be assumed or merely asserted . . . It must be proven. . . .", and the burden is on the one asserting discrimination. *Swain* v. *Alabama*, 380 U.S. 202, 205, 209 (1965); *Tarrance* v. *Florida*, 188 U.S. 519, 520 (1903).

A meticulous review of the entire record in the United States district court and of the entire record in the state court convinces us that no federally unconstitutional application of the Arkansas rape statutes to this defendant has been demonstrated. We reach this result upon the following considerations:

1. The statistical argument is not at all persuasive. The evidence as to the state at large showed that, in the 50 years since 1913, 21 men have been executed for the crime of rape; that 19 of these were Negroes and two were white;[8] that the victims of the 19 convicted Negroes were white females; and that the victims of the two convicted whites were also white females. As to Garland County, for the decade beginning January 1, 1954, Maxwell's evidence was to the effect that seven whites were

[8] *Needham* v. *State*, 215 Ark. 935, 224 S.W.2d 785 (1949); *Fields* v. *State*, 235 Ark. 986, 363 S.W.2d 905 (1963).

charged with rape (two of white women and the race of the other victims not disclosed), with four whites not prosecuted and three sentenced on reduced charges; that three Negroes were charged with rape, with one of a Negro woman not prosecuted and another of a Negro receiving a reduced sentence, and the third, the present defendant, receiving the death penalty. With respect to Pulaski County for the same decade, there were 11 whites (two twice) and 10 Negroes charged, with the race of the victim of two whites and one Negro not disclosed. Three whites received a life sentence. One white was acquitted of rape of a Negro woman. One received a sentence on a reduced charge, two were dismissed, two cases remained pending, one was not prosecuted, and the last was executed on a conviction for murder.[9] Of the Negroes, three with white victims and two with Negro victims received life. One case was dismissed, one was not arrested, two with Negro victims were sentenced on reduced charges, and one, Bailey, with a white victim, was sentenced to death. In Jefferson County eight Negroes were charged, with the cases against five dismissed, another dismissed when convicted on a murder charge, and two receiving sentences on reduced charges. Sixteen whites were charged. One was charged three times with respect to Negro victims and as to two of these charges received five years suspended on a guilty plea. Two others received three year sentences. One is pending, one was

[9] *Leggett* v. *State*, 227 Ark. 393, 299 S.W.2d 59 (1957); *Leggett* v. *State*, 228 Ark. 977, 311 S.W.2d 521 (1958), cert. denied 357 U.S. 942; *Leggett* v. *Henslee*, 230 Ark. 183, 321 S.W.2d 764 (1959), cert. denied 361 U.S. 865; *Leggett* v. *State*, 231 Ark. 7, 328 S.W.2d 250 (1959); *Leggett* v. *State*, 231 Ark. 13, 328 S.W.2d 252 (1959); *Leggett* v. *Kirby*, 231 Ark. 576, 331 S.W.2d 267 (1960).

executed,[10] and the rest were dismissed. The race of four defendants was not disclosed; three of these cases were dismissed and one is pending.

The complaint as to the federal court's restricting the statistical inquiry to three counties was not preserved by objection or offer of proof and there is no claim here that material from the State's remaining counties would be any more significant than that of the three counties presented.

These facts do not seem to us to establish a pattern or something specific or useful here, or to provide anything other than a weak basis for suspicion on the part of the defense. The figures certainly do not prove current discrimination in Arkansas, for in the last fourteen years the men executed for rape have been two whites and two Negroes. The circumstances of each rape case have particular pertinency. We are given no information as to how many Negroes and how many whites, after investigation, were not charged. Note *Hamm* v. *State*, 214 Ark. 171, 214 S.W.2d 917 ((1948), where a Negro convicted of rape of a white woman received a life sentence.

Turning to the three county statistics, we find no death sentence at all in Garland County in the 1954-1963 decade until Maxwell's case. We also find that of the two other Negroes charged, one was not prosecuted and the other was sentenced on a reduced charge. In Pulaski County we have about the same number of whites and Negroes charged, with only one death penalty, albeit in an interracial case, and one acquittal, also in an interracial case. But members of both races, three whites and five Negroes (three interracial), received life sentences. In Jefferson

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[10] *Fields* v. *State*, supra, 235 Ark. 986, 363 S.W.2d 905 (1963).

County we find few convictions for either race but one white man with a white victim was executed.

2. The defense argument goes too far and would, if taken literally, make prosecution of a Negro impossible in Arkansas today because of the existence in the past of standards which are now questionable. This would effect discrimination in reverse. The fact that this court has concluded that certain Arkansas procedures did not meet constitutional standards as interpreted by the Supreme Court (see *Bailey* v. *Henslee*, supra, 287 F.2d 936, and *Henslee* v. *Stewart*, supra, 311 F.2d 691, but compare *Moore* v. *Henslee*, 276 F.2d 876 (8 Cir. 1960)) does not mean that this former defect must permeate all subsequent proceedings in the state so as to render them unconstitutional. We pointed this out, as to jury selection, in *Bailey* v. *Henslee*, supra, p. 943 of 287 F.2d, where we said, "Discriminatory selection in prior years does not nullify a present conviction if the selection of the jury for the current term is on a proper basis", and where we noted the Supreme Court's comment, in *Brown* v. *Allen*, 344 U.S. 443, 479 (1953), that "Former errors cannot invalidate future trials".

3. The "nigger" references, while unfortunate, are only two in number and no objection was made to either. Both were at the state court hearing on defense motions when no jury was present. One was by the then superintendent of the state penitentiary. The other was the prosecutor's reference to "white persons or nigger persons". Throughout the balance of that hearing, throughout the entire state court trial, and throughout the federal habeas corpus

proceeding, although race is necessarily mentioned many times, not one other instance of this kind appears.

4. The other race references, complained of by the defense, are three in number. The first was in the prosecutor's opening statement to the jury: "I want to ask you first and tell you that it is your duty, and the Court will so instruct you, to put from your mind any thought of race. Ladies and Gentlemen, race has nothing to do with it . . .". The other two were of like import in his closing argument. We find no error in these three references. On their face they are as indicative of complete fairness as of unfairness. No point is raised as to tone of voice, attitude, or demeanor. The race of both the victim, who testified, and of Maxwell, who of course was present in court, was obvious. The comments, as we read them in context in the cold record, could well be deserving of commendation, rather than condemnation.

5. The fact that in this particular case the nine Negroes who appeared for jury service were all excused for cause by the court (three) or peremptorily challenged by the prosecution (six) and, as a consequence, the petit jury was all white, is not an unconstitutional result. *Swain* v. *Alabama*, supra, 380 U.S. 202, 209-22 (1965); *Hall* v. *United States*, 168 F.2d 161, 164 (D.C. Cir. 1948), cert. denied 334 U.S. 853; *United States ex rel. Dukes* v. *Sain*, 297 F.2d 799 (7 Cir. 1962), cert. denied 369 U.S. 868. See *Frazier* v. *United States*, 335 U.S. 497, 507 (1948).

6. We are aware of the comments of three Justices, at 375 U.S. 889-91, dissenting from the Supreme Court's denial of certiorari in *Rudolph* v. *Alabama*, 275 Ala. 115, 152

So.2d 662 (1963). The dissenters would have had the Court consider in that case whether the Eighth Amendment,[11] with its prohibition of "cruel and unusual punishments", and the Fourteenth "permit the imposition of the death penalty on a convicted rapist who has neither taken nor endangered human life". It is to be observed that the record before us reveals that the rapist of the victim here was evidently not one who failed to endanger human life. He struck and injured a helpless and aged man, he bruised the victim and he threatened to kill both. Despite whatever personal attitudes lower federal court judges as individuals might have toward capital punishment for rape, any judicial determination that a state's (in this case, Arkansas') long existent death-for-rape statute (it has been on the books since December 14, 1842) imposes punishment which is cruel and unusual, within the language of the Eighth Amendment and, by referenced inclusion, violative of due process within the meaning of the Fourteenth Amendment, must be for the Supreme Court in the first instance and not for us. See *Ralph* v. *Pepersack*, 335 F.2d 128, 141 (4 Cir. 1964).

B. The selection of the petit jury. The defense argument here is that due process and equal protection have been denied Maxwell because the petit jury list was compiled from a racially designated poll tax book and because the jury list itself indicated race. This argument was not advanced in the state court proceedings.

In Arkansas petit jurors are selected from electors. Ark. Stat. 1947, § 39-208. Electors are persons who cur-

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[11] The Arkansas Constitution, Art. 2, § 9, also reads:

"Excessive bail shall not be required, nor shall excessive fines be imposed; nor shall cruel or unusual punishment be inflicted; nor witnesses be unreasonably detained."

rently have paid the State's poll tax. Ark. Const., Art. 3, § 1; Ark. Stat. § 3-104.2. The statutes require that the official list, bound as a book, of a county's poll tax payers, § 3-118, and the poll tax receipts, § 3-227(b), specify color.

In contrast to the situation in the district court, pp. 213-16 of 229 F.Supp., no issue is raised here as to any deficiency in the efforts or methods of the jury commissioners, as to underrepresentation of the Negro race in the Gerland County jury lists, or as to any pattern of Negro repeaters on the juries.

In *Bailey* v. *Henslee,* supra, p. 940 of 287 F.2d, we outlined at footnote 5 the methods prescribed by the Arkansas Statutes for the selection of jury commissioners and of jurors and, at pp. 941-45, we set forth, with extensive citations, the applicable general principles relative to race in jury selection. We cited four United States Supreme Court cases of particular pertinence. *Norris* v. *Alabama,* 294 U.S. 587 (1935); *Smith* v. *Texas,* 311 U.S. 128 (1940); *Avery* v. *Georgia,* 345 U.S. 559 (1953); and *Eubanks* v. *Louisiana,* 356 U.S. 584 (1958). In *Henslee* v. *Stewart,* supra, p. 694 of 311 F.2d, we again referred to the same principles and the same cases. To that list of four Supreme Court opinions one should now add *Arnold* v. *North Carolina,* 376 U.S. 773 (1964), where, with a substantial proportion of Negroes in the county and on the poll tax list but only one on a grand jury in 24 years, the Court held that a prima facie case of equal protection denial had been established, and *Swain* v. *Alabama,* supra, 380 U.S. 202, 205-09 (1965), where the Court held that there was no "forbidden token inclusion" and that a prima facie case of discrimination had not been made out when Negro representation on jury panels was existent though less than the percentage of Negro males in the county, when

there was an average of six to seven Negroes on petit jury venires in criminal cases although no Negro had actually served on a petit jury since 1950, and when an identifiable group in a community is underrepresented by as much as ten percent. See, also, *Coleman* v. *Alabama*, 377 U.S. 129 (1964).

In both *Bailey* and *Stewart* we concluded that the facts, in the aggregate, established a prima facie case of improper limitation of Negroes in the selection of a petit jury panel. Among the several factors which led to our conclusion in both *Bailey* and *Stewart* were the circumstances that the poll tax receipt carried, with other information, the color of the taxpayer and that the jury commissioners themselves affixed race identification marks to their lists. We mentioned, p. 947 of 287 F.2d, p. 695 of 311 F.2d, that this presented "a device for race identification with its possibility of abuse".

We do not reach the same conclusion here. Our reasons are the following: (1) There is no proof that the jury list was compiled from the poll tax list. Each jury commissioner specifically testified otherwise and asserted that a proposed list was first independently prepared and that the racially designated poll tax book was consulted only thereafter. It had to be consulted, of course, in order to ascertain that the persons tentatively selected were qualified electors. (2) Although the list of petit jurors formally transmitted by the jury commissioners to the clerk of court possessed, at the time of the habeas corpus hearing, a small handwritten "c" after eight of the 36 names thereon, exclusive of alternates, there was no positive evidence as to when those leters were affixed or by whom. The list had been compiled two months before the crime with which Maxwell was charged. Each commissioner

denied making the identifying marks. (3) The clerk testified that he had no personal recollection whether, when he opened the list, it had any marks as to color; that he was not certain he had placed the marks on the list; that sometimes he did this for his own information and for newspapers; and that on most lists the jury commissioners did indicate race. Even the defense attorneys here had examined this particular list prior to the habeas corpus hearing. (4) None of the commissioners recalled the presence of race marks in the poll tax books. Each justified this conclusion on the ground that the marks were insignificant and unimpressive. (5) for what it is worth, one of the jury commissioners here was a Negro. The clerk testified that, with the exception of one or two terms, there has been a Negro jury commissioner for every term of court in Garland County in the last nine years.

In the light of these facts, we cannot conclude that the selection of this particular petit jury was unconstitutionally discriminatory. The use of race identification marks is, of course, under principles presently espoused, and as we noted in *Bailey* and again in *Stewart*, most disturbing. Whether the Arkansas statutory provisions requiring race identification on poll tax receipts and on the poll tax books are unconstitutional is a question not yet finally resolved. *Hamm* v. *Virginia State Bd. of Elections,* 230 F.Supp. 156, 157-58 (E.D. Va. 1964), summarily aff'd. sub nom. *Tancil* v. *Woolls,* 379 U.S. 19, appears to cast some doubt on their validity. Yet that opinion also states that race designations in certain records may serve a useful and lawful purpose. Until these Arkansas statutory requirements are nullified or repealed it is to be presumed that local officials must and will comply with them. The pres-

ent action is not one to restrain such compliance. Persons desiring that result have the right to seek it. In the meantime, we cannot say that, because the poll tax receipts and books designate race, it necessarily follows that every jury list in Arkansas is automatically unconstitutional. So to conclude would ignore the important possibility of initial selection being made, as here, independent of the poll tax list. The Arkansas system may presently be imperfect but "an imperfect system is not equivalent to purposeful discrimination based on race". *Swain* v. *Alabama,* supra, p. 209 of 380 U.S. We hold that the manner of selecting this particular petit jury list avoided any constitutional obstacle which might be inherent in the state statutes requiring race identification.

This makes it unnecessary to consider the argument (strenuously urged by Stephens and upheld by the District Court, pp. 212-13 of 229 F.Supp., as an alternative ground) that Maxwell waived any objection to the petit jury panel and did so within the permitted scope of *Fay* v. *Noia,* supra, 372 U.S. 391, 438-40 (1963).

C. The coat. As has been noted, the controversial coat was not introduced in evidence at the state court trial. Witnesses, however, made references to it in their testimony.

Maxwell, of course, has standing to complain of these references. *Jones* v. *United States,* 362 U.S. 257, 265-67 (1960).

The facts here are important: The offense took place at approximately three o'clock in the morning of November 3, 1961. It was raining and wet. The victim was promptly taken by the police to a hospital. At the hospital she described her assailant to Captain Crain of the Hot Springs

Police Department and to Officer O. D. Pettus, a Negro. She stated that the man had told her he was Willie C. Washington. Two persons with that name, senior and junior, were brought before her but she identified neither. She described her attacker in greater detail. Pettus thereupon suggested that it might have been Maxwell. Officer Childress, who was on car patrol duty and in uniform at the time, was directed by radio to pick up Maxwell. He went to the Maxwell home. The defendant's mother, then age 38, answered his knock. He told her he wanted to talk to William. She let him enter, checked to see if her son was in, and led Childress to the bedroom occupied by Maxwell and two younger sons. Childress told Maxwell he wanted to talk to him down town and asked him to dress. Childress testified that Maxwell went to the closet for clothes that were hanging there in a wrapper, and that he asked him "to put on these other clothes here that he had on". The latter were wet. Maxwell testified that he was told to put on the clothes he had on that night, that he went to the closet to get these, that he was then told to put on the clothes folded on the chair, that he was going to takes those clothes to the cleaners, and that they were not his.

Maxwell was taken to the hospital and before the victim. She at first did not identify him as her attacker but witnesses described her as visibly disturbed and shaking when he stood before her. She later said she had recognized him but feared for her life if she identified him. Maxwell was taken from the hospital to the police station.

Both sides admit that the exact times and place of Maxwell's arrest "is not entirely clear from the record".

It might have been at the home at about four a.m. or shortly thereafter at the hospital.

Captain Crain, with Officer Timms, went to the Maxwell home about five a.m. to get, as he testified at the habeas corpus hearing, "some more clothes that we thought might help us in our investigation of this case" or, as he testified at the trial, "I was looking for a particular object . . . I wanted what he was wearing that night". They had no search warrant. Mrs. Maxwell permitted them to enter. They were in uniform. The testimony is in conflict as to whether Mrs. Maxwell was then informed of any charge against her son; Crain said he so advised her but she stated, "He didn't say nothing about no rape case". (The district court found she had been so advised). She directed the officers to the clothes closet. The blue coat in question was obtained from that closet. It was eventually sent to the FBI laboratory. At the trial there was expert testimony that fibers in the coat matched others found on the victim's pajamas and on part of a nylon stocking picked up near the scene of the crime, and that fibers in the pajamas matched those found on the coat.

Mrs. Maxwell was understandably upset at the times the officers called at her home. In the margin we quote her testimony as to both the first call[12] and the second

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[12] ". . . it was late and I was asleep and someone knocked on the door and I woke up and I asked who was it and he said the policeman and I went to the door to let him in. He asked me did I have a son here by the name of William and I told him yes and he just come on in, he didn't have a search warrant or anything and I let him. I didn't know any better myself but I—I didn't know that he—you know, everything was all right, my children were at home and all and I just let him in."

call.[13] Maxwell's father worked at night and was not home when the officers called.

At the habeas corpus hearing Maxwell admitted that he had been adjudged guilty of two counts of petit larceny in 1958 and of federal post office charges in the same year.

We thus have a situation where the Maxwell home was twice visited by officers within two hours after the very crime was committed, where the second visit was within an hour of the first, where the officers were in uniform, where they were permitted access to the home by the mother, where on the second visit she pointed out the closet where the coat was, and where the accused, with his brothers, was still living with his parents in that home.

The district court held, pp. 209-211 of 229 F.Supp., that the taking of the coat violated no Fourth Amendment rights of Maxwell because his mother freely gave her consent and had the authority so to consent and because, upon all the circumstances, any search and seizure here was reasonable.

The parties are agreed, of course, that the Fourth Amendment's restraints against unreasonable searches and seizures are now applicable to the states under the due process clause of the Fourteenth Amendment and are to be measured by standards which govern federal cases, *Mapp* v. *Ohio*, 367 U.S. 643 (1961); *Ker* v. *California*, 374 U.S. 23, 33 (1963); *Aguilar* v. *Texas*, 378 U.S. 108, 110 (1964); *Linkletter* v. *Walker*, . . . U.S. . . . (1965),

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[13] "I opened the door and I was afraid to not let them in because—you know—when they said they were police officers—well, you just—I've just always—I just let the police officers in because I just feel like he is for peace and all, and I just—I don't know, I didn't know anything—I never been in anything like this and I just let them in and I still didn't think anything, didn't any of those officer have any search warrant or anything, didn't show me anything like that."

and that the Fifth Amendment's guaranty against self-incrimination, through the Fourteenth, is also applicable to the states and upon federal standards.[14] *Malloy* v. *Hogan,* 378 U.S. 1, 8, 11 (1964).

The parties are not in agreement, however, as to whether what was done here was incident to a lawful arrest, see *Preston* v. *United States,* 376 U.S. 364 (1964), or, if not, as to whether it was justified because of emergency or exceptional circumstances. We pass these issues and move on to the questions whether there was a consent by Mrs. Maxwell and, if so, whether her consent was a curative factor.

Although a consent freely and intelligently given by the proper person may operate to eliminate any question otherwise existing as to the propriety of a search, *Honig* v. *United States,* 208 F.2d 916, 919 (8 Cir. 1953); *Burge* v. *United States,* 332 F.2d 171, 173 (8 Cir. 1964), cert. denied 379 U.S. 883; *Burnside* v. *Nebraska,* . . . F.2d . . . (8 Cir. 1965), the defense argues that there is a presumption that a consent is coerced unless proved otherwise by the government and that the facts here—the early morning calls at the Maxwell home, the presence of men clothed with the uniform of authority, the confrontation of a Negro mother by white police, and her obvious concern

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[14] The Fifth-Fourteenth Amendment argument as to self-incrimination, although possibly embraced in the language of the first amendment to the petition for writ of habeas corpus (where it was alleged that the police searched Maxwell's room "and obtained clothing belonging to petitioner without a search warrant, without the consent of petitioner and without the consent of petitioner's parents"), was apparently not pressed before the district court and is really asserted for the first time only on this appeal. Because of this we could choose to ignore it here. *Sutton* v. *Settle,* 302 F.2d 286, 288 (8 Cir. 1962), cert. denied 372 U.S. 930; *Huntington* v. *Michigan,* 334 F.2d 615, 616 (6 Cir. 1964); *Trujillo* v. *Tinsley,* 333 F.2d 185 (10 Cir. 1964). But this is a capital case and, without our doing so regarded as a precedent, we consider this point on the merits.

and confusion—"militate against finding voluntary consent".

We recognize that it has been said that the government has the burden to establish the legal sufficiency of a consent. *Judd* v. *United States*, 190 F.2d 649, 651 (D.C. Cir. 1951); *United States* v. *Page*, 302 F.2d 81, 83-84 (9 Cir. 1962). Nevertheless, the existence and voluntariness of a consent is a question of fact. *United States* v. *Page*, supra, p. 83 of 302 F.2d. And Judge Young specifically found that there was a consent here and that it was voluntary. We cannot say that his finding was either erroneous or unsupported by substantial evidence. *United States* v. *Page*, supra, p. 85 of 302 F.2d; *Davis* v. *United States*, 328 U.S. 582, 593 (1946); *United States* v. *Ziemer*, 291 F.2d 100, 102 (7 Cir. 1961), cert. denied 368 U.S. 877; *McDonald* v. *United States*, 307 F.2d 272, 275 (10 Cir. 1962). The record clearly discloses no concealment of identity, no discourtesy, no abuse or threat, and no ruse or force exerted by the officers. It contains testimony that Mrs. Maxwell showed and directed them to the closet where her son's clothes were. On cross-examination she herself conceded that she permitted the officers to enter and to obtain the coat. She fully cooperated. She and her husband were both present throughout the state court trial, sat with their son at the counsel table, and heard, with no indication of opposition, the testimony of the officers as to how the coat was obtained with her permission. All this adequately supports the court's finding of voluntary consent. *Roberts* v. *United States*, 332 F.2d 892, 897 (8 Cir. 1964). The factual situation is different than that of *Pekar* v. *United States*, 315 F.2d 319, 325 (5 Cir. 1963), urged by Maxwell here, or the implied coercion

referred to in *Amos* v. *United States*, 255 U.S. 313, 317 (1921).

What, then, is the effect of this voluntary consent on the part of Maxwell's mother? We recognize, of course, that constitutional rights are not to depend upon "subtle distinctions, developed and refined by the common law in evolving the body of private property law". *Jones* v. *United States*, supra, 362 U.S. 257, 266 (1960). But this is not a case of property right distinctions. The defense concedes that Mrs. Maxwell possessed a proprietary interest in the house; that Maxwell himself only shared a room there with his two younger brothers; and that no landlord-tenant relationship existed between Maxwell and his parents. Mrs. Maxwell had control of the premises, undiminished by any kind of a less-than-fee interest possessed by Maxwell. This fact stands in contrast to the hotel or rental situations.[15] See *Stoner* v. *California*, 376 U.S. 483 (1964); *United States* v. *Jeffers*, 342 U.S. 48 (1951); *Lustig* v. *United States*, 338 U.S. 74 (1949); *Chapman* v. *United States*, 365 U.S. 610 (1961); *McDonald* v. *United States*, 335 U.S. 451 (1948); *Klee* v. *United States*, 53 F.2d 58 (9 Cir. 1931). The situation strikes us as being no different, factually, than if Mrs. Maxwell herself had brought the coat, it being properly in her possession, to the authorities. They came to the home, it is true, but they obtained the coat by freely allowed access to the house, by freely given directions as to its location, and by freely permitted acquisition of it by the officers and departure with it in their hands. *Roberts* v. *United States*,

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[15] But even in these situations abandonment (not present here) while the rental term is not yet expired overcomes any obstacle presented by a rental relationship. *Abel* v. *United States*, 362 U.S. 217, 240-41 (1960); *Feguer* v. *United States*, 302 F.2d 214, 248-49 (8 Cir. 1962), cert. denied 371 U.S. 872; *Roberts* v. *United States*, 332 F.2d 892, 898 (8 Cir. 1964).

supra, 332 F.2d 892, 896-97 (8 Cir. 1964); *Burge* v. *United States*, 342 F.2d 408, 413-14 (9 Cir. 1965); *Rees* v. *Peyton*, 341 F.2d 859, 861-63 (4 Cir. 1965); *United States* v. *Guido*, 251 F.2d 1, 3-4 (7 Cir. 1958), cert. denied 356 U.S. 950; *Woodard* v. *United States*, 254 F.2d 312 (D.C. Cir. 1958), cert. denied 357 U.S. 930; *Fredrickson* v. *United States*, 266 F.2d 463, 464 (D.C. Cir. 1959); *Morales* v. *United States*, . . . F.2d . . . (9 Cir. 1965); *United States ex rel. McKenna* v. *Myers*, 232 F.Supp. 65, 66 (E.D. Pa. 1964). See *United States* v. *Maroney*, 220 F.Supp. 801, 805-06 (W.D. Pa. 1963); *Gray* v. *Commonwealth*, 198 Ky. 610, 249 S.W. 769 (1923); *Irvin* v. *State*, . . . Fla. . . . , 66 So.2d 288, 293 (1953), cert. denied 346 U.S. 927.

But the defense argues that this coat was Maxwell's personal effect and clothing; that it could not be picked up or acquired in any manner, even with a valid search warrant, without his consent; and that it was evidentiary material not the proper subject of a search. *Gouled* v. *United States*, 255 U.S. 298 (1921) and *Holzhey* v. *United States*, 223 F.2d 823 (5 Cir. 1955) are particularly cited.

Whatever force might otherwise lie in the facts that the coat was clothing personal to Maxwell (and thus presumably an "effect" within the meaning of the Fourth Amendment), that it was not contraband or an article the possession of which is illegal, or an instrumentality or fruit of the crime, or capable of possible use to effect his escape, see *Harris* v. *United States*, 331 U.S. 145, 154 (1947); *United States* v. *Lefkowitz*, 285 U.S. 452, 463-66 (1932); *Agnello* v. *United States*, 269 U.S. 20, 30 (1925); *Honig* v. *United States*, supra, pp. 919-20 of 208 F.2d, this argument overlooks the consent to the officers' acquisition of the coat by a person having the proprietary interest in the premises where it was. If there was a search here at

all, it was not a general search and certainly it was not a search violative of a locked container or the like. *Roberts* v. *United States*, supra, p. 898 of 332 F.2d. Compare *United States* v. *Blok*, 188 F.2d 1019, 1021 (D.C. Cir. 1951); *Holzhey* v. *United States*, supra, p. 826 of 223 F.2d. It was an item which freely came into the hands of the authorities by one who had the right to make it available to them. See *Haas* v. *United States*, 344 F.2d 56, 57-60 (8 Cir. 1965), where this court upheld the seizure, in a search pursuant to a lawful arrest, of a defendant's grey suit which fit the description of clothing worn by a bandit and *Irvin* v. *State*, supra, p. 293 of 66 So. 2d. Compare *Williams* v. *United States*, supra, 263 F.2d 487.

The situation therefore appears to us to be one not involving any unreasonable search or seizure within the prohibition of the Fourth, Fifth, and Fourteenth Amendments. Reasonableness, after all, is the applicable standard. *United States* v. *Rabinowitz*, 339 U.S. 56, 63 (1950); *Sartain* v. *United States*, 303 F.2d 859, 862-63 (9 Cir. 1962), cert. denied 371 U.S. 894.

Neither are we impressed with any suggestion that the testimonial references to the coat were in any way a further violation of Maxwell's right not to be compelled physically to be a witness against himself, within the meaning of the Fifth and Fourteenth Amendments. The description of the coat and what was found on it was objective evidence from the mouths of witnesses who saw or who investigated. The coat is in no different category than the contours of Maxwell's face, the color of his hair, the description and the nature and condition of the clothes he wore, and his very size and color. *Holt* v. *United States*, 218 U.S. 245, 252-53 (1910); *Caldwell* v. *United States*, 338 F.2d 385, 389 (8 Cir. 1964).

Opinion of Court of Appeals

The district court's denial of the petition for habeas corpus is therefore affirmed. Where life is concerned a conclusion of this kind may involve a personal reluctance for judges. We deal, however, with statutory provisions which are not our province, at least not yet (see *Rudolph* v. *Alabama*, supra, 375 U.S. 889), to change. Maxwell's life therefore must depend upon different views entertained by the Supreme Court of the United States or upon the exercise of executive clemency.

Rives, dissenting:

I agree with the disposition made in the majority opinion of appellant's assignments of error 1 and 2, as raised in this appeal.

I cannot agree with the ruling and disposition made in respect to assignment of error 3, i.e. the search and seizure issue. . . the taking of appellant's "coat" from his place of abode by police officers under the factual circumstances related in the majority opinion.

As I view the facts in the majority opinion and those appearing in *Maxwell* v. *State*, 370 S.W.2d 113 (Ark., 1963); and *Maxwell* v. *Stephens*, 229 F.Supp. 205 (E.D. Ark., 1964), I think it is readily apparent that the search of appellant's place of abode and seizure of his "blue coat" were made under factual circumstances which reveal the same to be in violation of his Fourth Amendment rights made obligatory on the States by the Fourteenth Amendment to enforce.

I find fortification for that conclusion from the opinion and decision of the Court of Appeals of Kentucky, as made in *Elmore* v. *Commonwealth* (Ky.), 138 S.W.2d 956 (1940), where that Court considered a factual situation in

a rape case, which are on all fours with those appearing in the case at bar and ruled the seizure there made to be unlawful under federal constitutional standards.

In adjudging the validity of the search and seizure issue here, the starting point begins with appellant's arrest. Hence I consider the constitutionality thereof must be measured by a consideration of the following facts:

When Police Officer Childress first went to appellant's home he did so for the purpose of taking appellant into custody. At that time he told appellant, "he (Childress) wanted to talk to him downtown, and asked him to dress . . ." and "to put on (the) clothes he had on" previously that night, "which were wet." Under compulsion of Childress' command, appellant dressed. I find no reasonable ground for hesitancy in determining Maxwell was then placed under arrest. cf. *State* v. *King*, 84 N.J. Super. 237, 201 A.2d 758. Concededly, no search was then made by Officer Childress to seize appellant's coat incident to his arrest.

That appellant did not voluntarily leave his home in company with Officer Childress is manifest, cf. *Judd* v. *United States*, 190 F.2d 649 (D.C. 1951).

One or two hours thereafter, Capt. Crain and Officer Timms went to the Maxwell home, without a search warrant, and took possession of appellant's "blue coat" under circumstances as related in the majority opinion. The conversation those two police officers then had with appellant's mother does not raise a question of credibility. The only issue presented thereby is whether "consent" as claimed by the State was freely given to those officers to search the Maxwell home, and whether appellant's mother had power of possession to release appellant's personal belongings to the custody of such officers.

I do not consider the conversation appellant's mother had with Capt. Crain and Officer Timms to have any probative value in making a determination of the validity of the search and seizure made by those officers. Mere acquiescence in the apparent authority of a police officer is not usually considered consent. cf. *Dukes* v. *United States,* 275 Fed. 142 (4 Cir., 1921); *United States* v. *Marquette,* 271 Fed. 120 (N.D. Calif., 1920). What was then said by appellant's mother "was but showing her respect for and obedience to the law and she was not consenting to the search regardless (of lack of a) search warrant." *Stroud* v. *Commonwealth* (Ky.), 175 S.W.2d 368, 370, citing *Amos* v. *United States,* 255 U.S. 313 (1921); and *Elmore* v. *Commonwealth, supra.* As the majority opinion notes, the validity of arrest and search and seizure here must be determined by reasonableness in light of the particular circumstances revealed. I consider the factual circumstances in the case at bar reveal "implied coercion."

Admittedly, the coat that was seized was the personal property of appellant. Being under arrest at the time he was taken from the place of his abode, where the coat was then situate, the only reasonable inference is that he did not voluntarily place possession of his coat in his mother or anyone else. No one can waive his constitutional right to assert his right of possession thereof. The search here made was not incident to his arrest. To be legal, the seizure of appellant's coat could only have been validly made without a search warrant at the time appellant was arrested by Officer Childress. His other clothing was so seized.

Respondent's argument that this search and seizure was lawful because of possible destruction of evidence, and "inability to secure issuance of a search warrant," is hol-

low, indeed. Appellant was then under arrest. There is no evidence that his mother had any knowledge that his coat might be material to any offense for which her son was arrested. The only possible inference I can make is that she first gleaned knowledge of the cause of his arrest from Capt. Crain or Officer Timms during the time the illegal search and seizure here considered was made. It is not contended that Childress told her why appellant was being taken "downtown". cf. *Foster* v. *United States* (8 Cir., 1960), 281 F.2d 310.

I would reverse the judgment below.

Opinion of District Court

IN THE UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF ARKANSAS

PINE BLUFF DIVISION

No. PB 64 C 4

WILLIAM L. MAXWELL,

Petitioner,

—v.—

DAN D. STEPHENS, Superintendent of Arkansas State Penitentiary,

Respondent.

MEMORANDUM OF OPINION

This habeas corpus proceeding is brought by William L. Maxwell, a Negro male, age 24, who was convicted for the crime of rape in the Circuit Court of Garland County, Arkansas, on March 21, 1962, and sentenced to death. The conviction was affirmed by the Arkansas Supreme Court in the case of Maxwell v. State, 236 Ark. 694, 370 S.W.2d 113 (1963), and following a denial of petition for rehearing the date of execution was scheduled for January 24, 1964. No application for certiorari was made to the United States Supreme Court. The instant action was filed on January 20, 1964, alleging that the state court conviction was obtained in violation of petitioner's constitutional rights guaranteed by the Fourteenth Amendment to the United States Constitution. Petitioner was permitted to amend

his petition twice and a hearing was held on the petition, as amended, on February 12, 1964, as well as on February 27, 1964, at which time the testimony was concluded. Petitioner and respondent have submitted briefs in support of their respective contentions.

Throughout the state court proceedings, petitioner was represented by Mr. Christopher C. Mercer, Jr., a capable attorney experienced in this type of litigation.[1] Subsequent to the state court proceedings, and prior to this action, petitioner obtained the services of his present counsel who now represent petitioner in this habeas corpus proceeding. The question of Maxwell's guilt is not now before this court. Cf. Henslee v. Stewart, 311 F.2d 691 (8th Cir. 1963); Bailey v. Henslee, 287 F.2d 936, 939 (8th Cir. 1961). The circumstances of the crime and the evidence against Maxwell are fully discussed by the Arkansas Supreme Court in Maxwell v. State, supra, 236 Ark. 696-700, 370 S.W.2d 114-116. The only issue which now confronts this court is whether Maxwell's federal constitutional rights, in the particulars relied upon, were preserved in the state court action.

The alleged violations of petitioner's constitutional rights, in substance, are that: (1) Petitioner was illegally arrested and there was an unlawful search and seizure of his home and person; (2) Petitioner was tried in a hostile atmosphere; (3) Racial discrimination was practiced in the selection of the jury which tried petitioner; (4) There has been an unconstitutional application and enforcement of Ark.Stat. § 41-3403 (1947) against petitioner, and the death

[1] Mr. Mercer is a graduate of the University of Arkansas School of Law and was one of the attorneys who represented Lonnie Mitchell in a habeas corpus proceeding. Mitchell v. Henslee, 208 F.Supp. 533 (E.D.Ark. 1962) rev'd per curiam Case No. 17,208, 332 F.2d 16 (8th Cir. May 4, 1964).

penalty upon conviction for rape provided by this statute is a "cruel and unusual" punishment contrary to the basic concepts of a civilized society. In this opinion, the Court will deal with these issues in the order mentioned.

I. The Arrest and Search

The offense with which petitioner was charged occurred about three o'clock in the morning of November 3, 1961. Approximately one hour later, petitioner was taken into custody by police officers at his parents' home where he lived. This was done on the basis of information and descriptions given by the victim to a Negro police officer, O. D. Pettis, now deceased. Sometime around five o'clock that morning police officers Captain Crain and Officer Timms made a trip back to petitioner's home in order to obtain some clothing belonging to petitioner allegedly worn during the commission of the offense; and another trip was made by Office Timms later that same morning in order to obtain a change of clothing for petitioner since arrangements had been made for the clothes allegedly worn by petitioner during the rape, and which petitioner put on when taken into custody, to be sent to the laboratory of the Federal Bureau of Investigation in Washington, D. C.

When petitioner was taken into custody he was viewed by the victim at a local hospital and subsequently identified as the assailant. Thereupon, petitioner was incarcerated in the City Jail and held until later during the afternoon or evening of November 3rd, when he was taken to the County Jail in nearby Malvern, where petitioner remained until November 6th. Petitioner signed a written confession while at the County Jail in Malvern and made another confession later in Hot Springs. Petitioner was then returned to the city of Hot Springs, where on November 7, he was

formally charged by information with the crime of rape under Ark.Stat. § 41-3401 (1947).

No warrant for petitioner's arrest was issued prior to November 7th when petitioner was formally charged, and a warrant to search petitioner's home was never procured. On November 3rd, while petitioner was held at the Hot Springs City Jail, police officers combed petitioner's hair and obtained a nylon thread from his hair, as well as a specimen of his hair. The police officers obtained clothing from petitioner's person, as well as his home. Petitioner was not permitted to see his parents or a lawyer, and according to petitioner, he was mistreated and coerced into signing a confession. Petitioner now argues that the arrest, and the search of his person and home were illegal and constitute a violation of his constitutional rights.

(a) *Petitioner's Arrest Without A Warrant*

[1] The lawfulness of petitioner's arrest without a warrant must be determined by the law of Arkansas, subject to the test of reasonableness under the Fourth and Fourteenth Amendments to the United States Constitution. Ker v. California, 374 U.S. 23, 40, 83 S.Ct. 1623, 10 L.Ed.2d 726 (1962). In Arkansas, it is provided by statute that an arrest without a warrant is authorized where the arresting officer has reasonable grounds for believing that the person arrested has committed a felony. See Ark.Stat. § 43-403 (1947). The Arkansas Supreme Court has held that where a felony has in fact been committed, an arrest without a warrant may be made where the officer has reasonable grounds to suspect the particular person arrested. Carr v. State, 43 Ark. 99 (1884). Knight v. State, 171 Ark. 882, 286 S.W. 1013 (1926). Lane v. State, 217 Ark. 114, 229

S.W.2d 43 (1950). Trotter and Harris v. State, 237 Ark. 820, 377 S.W.2d 14 (1964).

At the time of petitioner's arrest, the fact that a felony had been committed was clearly established. Miss Stella Spoon had been brutally raped and her 90 year old father with whom she resided had been mercilessly struck and left bleeding when he attempted to aid her. Miss Spoon had given a description of her assailant to Officer Pettis, the Negro city policeman, and had further told him that her assailant had said that his name was "Willie C. Washington".[2] The first suspects brought to the hospital for Miss Spoon to identify were Willie C. Washington, Sr., Willie C. Washington, Jr., and another Negro. Miss Spoon told Officer Pettis that none of these individuals was her assailant, but she gave Pettis some additional descriptions which she was better able to do by comparison of her attacker with Willie C. Washington, Jr. Officer Pettis then indicated to Miss Spoon and the other policemen in her room that he knew the identity of her assailant. Petitioner was then taken into custody and was the next person brought to Miss Spoon's hospital room for her to identify. When petitioner was brought into Miss Spoon's hospital room, according to the testimony of Officer Timms at the state court trial, Miss Spoon " * * * started shaking and drawing herself up and shaking real bad," [3] but she did not then identify petitioner as her attacker. When asked by petitioner's counsel in the state court trial why she did not immediately in her room identify petitioner as her assailant, Miss Spoon responded: "Because I had been

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[2] The details of the identification are set out in the transcript of Miss Spoon's testimony taken at the hearing on the habeas corpus proceeding. See also Record, Vol. II, pp. 286-290, Maxwell v. State, 236 Ark. 694, 370 S.W.2d 113 (1963) (hereinafter cited as State Court Record).

[3] State Court Record, Vol. II, pp. 312 and 313.

threatened, my father had been threatened. I don't know legal procedure, I didn't know whether they could hold him or not, and if he happened to break and get loose or something, he would do like he said he would, just get a gun and come back and kill us. I didn't know how long I was going to stay in that hospital." [4] On direct examination, Miss Spoon testified that there was not any possible doubt in her mind that petitioner was her attacker.[5]

[2] The conclusion is compelling that petitioner was arrested with reasonable cause and that therefore the arrest without a warrant was lawful under the circumstances. The police were benefited by a description given by Miss Spoon as to the size, complexion and clothes of her assailant. Officer Pettis was undoubtedly familiar with the Negro community. He had seen petitioner that night on the avenue and his description matched the one given by Miss Spoon. Petitioner, known to the police as "Plunk", had previously experienced difficulties with the police, and petitioner personally knew Officer Pettis. His home was near the place of attack, as well as the victim's home.

(b) *The Search of Petitioner's Person*

[3, 4] It is settled law that a search of the person or premises incident to a lawful arrest is permissible. Preston v. United States, 84 S.Ct. 881 (1964). Ker v. California, supra. Brinegar v. United States, 338 U.S. 160, 69 S.Ct. 1302, 93 L.Ed. 1879 (1948). United States v. Iacullo, 226 F.2d 788 (7th Cir. 1955). See also Commonwealth v. Holmes, 344 Mass. 524, 183 N.E.2d 279 (1962), and cases collected in Annot., 89 A.L.R.2d 715, 780-801 (1963). Since

[4] State Court Record, Vol. II, p. 280.
[5] State Court Record, Vol. II, pp. 263, 264, and 268.

the arrest without a warrant was lawful under the circumstances, it follows that the evidence obtained from the clothes removed from petitioner's body and the thread and hair taken from petitioner's head were not illegally obtained. See United States v. Iacullo, supra, 226 F.2d at 792, discussing United States v. Di Re, 332 U. S. 581, 68 S.Ct. 222, 92 L.Ed. 210 (1948); and Draper v. United States, 358 U.S. 307, 79 S.Ct. 329, 3 L.Ed.2d 327 (1958). United States v. Cole, 311 F.2d 500 (7th Cir. 1963), cert. denied 372 U.S. 967, 83 S.Ct. 1092, 10 L.Ed.2d 130 (1963).

The items obtained from petitioner at the Hot Springs City Jail, *i. e.*, a hair from his head, a strand of nylon thread found in his hair, and his clothing, were necessary to a thorough investigation of the offense with which petitioner was charged and the obtaining of these items in the course of the investigation was a reasonable procedure under the circumstances. According to Miss Spoon's report, her attacker had worn a nylon stocking on his head which came off as the attacker attempted to pull it over his face. The police had found a nylon stocking near the victim's house in the vicinity where the attack had occurred. Furthermore, the clothing worn by petitioner had seminal stains, as well as blood stains. These items, along with others, were sent to the Federal Bureau of Investigation laboratories in Washington, D. C., for scientific analysis.

(c) *The Search of Petitioner's Home*

Petitioner argues that the police officers conducted an illegal search and seizure in obtaining a blue coat from his home after petitioner was arrested. The coat was obtained by Captain Crain from petitioner's mother and it was used as evidence in the state court trial. (Certain clothes obtained by Officer Timms from petitioner's mother

on a second trip back to the house were merely a convenient change of clothes for the ones obtained from petitioner at the City Jail and were not used as evidence.) Admittedly, the blue coat was obtained without a search warrant.

In the state court trial, Captain Crain testified that he obtained the coat with the permission of petitioner's mother, and this was not disputed at the state court trial despite the fact that petitioner's mother was in the court room and heard this testimony.[6] At the hearing on the instant petition, Captain Crain again testified that he explained to petitioner's mother that he wished to get the clothes worn by petitioner that night and that she took him to petitioner's room and showed him the closet where the coat was hanging. Captain Crain informed petitioner's mother that petitioner had been accused of committing rape. Petitioner's mother, age 40, testified that petitioner lived there with his parents and occupied a room with his two brothers. At the time of the search, petitioner's father was at work and petitioner's two brothers were in bed asleep. Petitioner's mother further stated in substance at the hearing on the instant petition that she did not know anything about a search warrant and did not object to the police coming into her home since she did not think anything was wrong and there was no reason not to cooperate. On cross-examination, petitioner's mother stated: "I didn't never say that I didn't grant permission."

The evidence not only reflects that petitioner's mother freely and voluntarily consented to the police officer taking the coat, but she also cooperated with the officer to the extent that she showed the officer where the coat was lo-

[6] State Court Record, Vol. II, pp. 333 and 334.

cated. The coat was obtained less than an hour after petitioner was arrested. The search itself was not a general exploratory search of the entire house, nor was it a rigorous search. The police officer simply requested to see the clothes which petitioner had worn that night and petitioner's mother permitted the police to enter her house and accompanied the police to petitioner's room and directed them to the closet. The analysis made by the Federal Bureau of Investigation at the laboratory in Washington, D. C., established that the blue-black woolen fibers in the nylon stocking found near Miss Spoon's house, as well as the blueblack fibers found in Miss Spoon's pajamas, came from this coat taken from the closet.[7]

[5-7] Of course, petitioner's state court conviction cannot be based upon evidence obtained in violation of the Fourth Amendment to the United States Constitution and contravening the Fourteenth Amendment due process clause. Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961). However, the protection of the Fourth Amendment prohibits only those searches which are "unreasonable". United States v. Rabinowitz, 339 U.S. 56, 70 S.Ct. 430, 94 L.Ed. 653 (1950); and a search and seizure are not deemed to be unreasonable and therefore unlawful if based upon a valid consent freely and understandably given. Foster v. United States, 281 F. 2d 310 (8th Cir. 1960). See also United States v. Roberts, 223 F.Supp. 49 (E.D.Ark.1963). Yet, ultimately, the reasonableness of any search depends upon the facts and circumstances of each case. United States v. Rabinowitz, supra, 339 U.S. at 63, 70 S.Ct. 430, 94 L.Ed. 653.

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[7] State Court Record, Vol. II, p. 359.

It would unduly burden this opinion to attempt to analyze the many cases involving consent to a search and seizure of property or evidentiary material. These cases are fully discussed by Chief Judge Henley in United States v. Roberts, supra, 223 F.Supp. at 58 and 59, in which the court observes that there is no hard and fast rule but rather the determination in each case is based upon a consideration of all of the surrounding facts and circumstances, including the validity of the consent. Only recently, the United States Supreme Court in Stoner v. California, 84 S.Ct. 889 (1964) rejected the argument that the search of a hotel room, although conducted without the consent of the accused, was lawful because it was conducted with the consent of the hotel clerk. Similarly, the Supreme Court has refused to permit the unlawful search of a hotel room to rest upon the consent of the hotel proprietor, Lustig v. United States, 338 U.S. 74, 69 S.Ct. 1372, 93 L.Ed. 1819 (1949), or a hotel manager, United States v. Jeffers, 342 U.S. 48, 72 S.Ct. 93, 96 L.Ed. 59 (1951); and a search of a tenant's room with the consent of the owner of the house has been held unconstitutional, Chapman v. United States, 365 U.S. 610, 81 S.Ct. 776, 5 L.Ed.2d 828 (1961), as well as a search of an occupant's room in a boarding house, McDonald v. United States, 335 U.S. 451, 69 S.Ct. 191, 93 L.Ed. 153 (1948). However, all of these cases are distinguishable from the instant case in which petitioner merely shared a room with his two brothers in his parents' home.

In Stoner v. California, supra, the Supreme Court discussed the argument that the search of the defendant's room was justified by the hotel clerk's consent and concluded:

> "It is important to bear in mind that it was the petitioner's constitutional right which was at stake here,

> and not the night clerk's nor the hotel's. It was a right, therefore, which only the petitioner could waive by word or deed, either directly or through an agent. It is true that the night clerk clearly and unambiguously consented to the search. *But there is nothing in the record to indicate that the police had any basis whatsoever to believe that the night clerk had been authorized by the petitioner to permit the police to search the petitioner's room.*" (emphasis added)

[8] The evidence adduced at the hearing on this petition, as well as the record from the state court trial, clearly and positively establishes that petitioner's mother freely, voluntarily, intelligently and understandingly consented to and authorized the search made by Captain Crain to obtain the blue coat. The search was made in her home at a time when the premises were under her sole control and she had the right to exclude whomever she chose, even including the petitioner. Petitioner's mother had the authority to permit the police or anyone else to enter petitioner's room and examine the clothes in the closet. In the language of the Supreme Court in Stoner, the police did have a "basis * * * to believe that * * * [petitioner's mother] * * * had been authorized by the petitioner to permit the police to search the petitioner's room." This is true not because of any agency based upon the mother-son relationship, but rather because petitioner's mother, unlike petitioner himself, had the sole control, power and, at the time, the superior right to exclude others from not only her home but also from the very room which petitioner shared with his two brothers, and it was her free and voluntary choice to permit the police to enter and search the closet.

It is the holding of this Court that the blue coat taken by Captain Crain was obtained by a lawful search and seizure, and petitioner's contention to the contrary is rejected. However, the propriety of the search and seizure need not rest solely upon the consent given by petitioner's mother. The lawfulness of this search and seizure is based upon a consideration of all of the facts and circumstances surrounding the search and seizure which, in the opinion of the Court, establish that from a realistic and practical standpoint there was nothing unfair, unreasonable or oppressive in the conduct of the police in the performance of the search and seizure of the blue coat. The consent given by petitioner's mother, the demeanor and actions of Captain Crain in informing petitioner's mother of exactly what was sought, as well as informing her of the charge against petitioner, the orderly investigation of only the closet in her presence without any protest whatsoever—all of these things taken in the aggregate compel this Court to the conclusion that the police acted fairly and reasonably, and did not violate petitioner's constitutionally protected rights against an unreasonable search and seizure.

(d) *The Alleged Mistreatment and Coerced Confessions*

[9] It is true, as now argued, that when petitioner was taken into custody and incarcerated in the City Jail he was not permitted to see his parents or a lawyer. Maximum precautions were taken by the police primarily because the City Jail was a converted military jail which furnished poor security and there had been numerous escapes from this jail in the past. In fact, part of the jail was secured merely by a cyclone fence. Petitioner testified at the hearing on the instant petition that he was mistreated by the police officers and that he was coerced into making a con-

fession in Hot Springs, as well as one in Malvern. This statement that the confessions were coerced was sharply disputed by the testimony of the police officers. Neither confession was used as evidence in the state court trial and all of the evidence there relied on was obtained prior to the time when petitioner allegedly made either of the two confessions. Petitioner's conviction was in no way based upon any confession or information obtained therefrom. Therefore, any attempt to determine whether the confessions were voluntary is unnecessary.[8]

II. Adverse Atmosphere

[10] Petitioner relies principally on the testimony of Kenneth Adair to support the contention that the atmosphere which existed in Garland County prior to and during the trial was so hostile and adverse that petitioner did not receive a fair trial. Mr. Adair, a Negro newspaper publisher in the city of Hot Springs who followed petitioner's trial daily and who contributed funds for the bringing of this habeas corpus proceeding, testified that there was a "tense atmosphere and some talk of mob violence." Irving S. Stephenson, a Negro businessman and former Garland County jury commissioner called as a witness by respondent, also testified that there was an "adverse atmosphere". On the other hand, Darfus Henry, a Negro businessman who was one of the jury commissioners for the jury empaneled for the trial of petitioner's case in state court, testified that there was not a hostile atmosphere at the time.

In the state court proceeding, petitioner requested a change of venue on the alleged ground that he could not

[8] Neither of these confessions were introduced into evidence at the hearing on the instant petition.

obtain a fair and impartial trial in Garland County. Accordingly, a hearing was scheduled and Dan Wolf, Mayor of the City of Hot Springs, and Duffie Searcy, the Sheriff of Garland County, were called by petitioner to testify at the hearing, which was held pursuant to Ark.Stat. § 43-1502 (1947). Mayor Wolf, a resident of Hot Springs off and on for about thirty years, stated that he had talked to "both the colored people and the white people" in the area and it was his opinion that petitioner could get a fair and impartial trial in Garland County.[9] Similarly, Sheriff Searcy, a resident of Garland County for fifty-one years, stated that petitioner could get a fair and impartial trial in Garland County.[10] These were the only witnesses called to testify at the hearing, and the request for a change of venue was denied.

Obviously such a heinous crime as perpetrated against Miss Spoon would arouse some public sentiment. However, the evidence produced at the hearing on this petition falls far short of the contention now urged in this regard. Cf. Moore v. Dempsey, 261 U.S. 86, 43 S.Ct. 265, 67 L.Ed. 543 (1923). On the contrary, the undisputed evidence at the state court hearing established that petitioner could get a fair and impartial trial in Garland County, and the voluminous record of the state court proceeding reflects that petitioner did in fact receive such a trial.

III. Selection of the Jury

Petitioner contends that there was racial discrimination practiced in the selection of the jury which was empaneled to try his case in the state court. This argument was not raised at any time in the state court proceeding, notwith-

[9] State Court Record, Vol. I, p. 97.
[10] State Court Record, Vol. I, p. 102.

standing the fact that the record in this proceeding discloses the attorney who represented petitioner throughout the state court action, Mr. Chris Mercer, was well aware of the constitutional right against jury discrimination on the basis of race, and checked the jury list, ascertained the identity of the jury commissioners, knew the percentage of Negroes in the area, noticed some repeaters, knew about the racial designations on some of the names, was fully familiar with the practice of quashing jury panels on the ground of racial discrimination, and, in fact, discussed the jury panel with petitioner, and, further, filed several motions directed at other aspects of alleged unconstitutionality of the state court proceeding.

[11] It would reasonably appear that it was, in the language of Fay v. Noia, 372 U.S. 391, 439, 83 S.Ct. 822, 9 L.Ed.2d 837 (1963), the "considered choice" of petitioner deliberately not to raise this argument of jury discrimination, and, therefore, there was a waiver of the right to make this argument now. In Fay v. Noia, supra, 372 U.S. at 438 and 439, 83 S.Ct. 822, 849, 9 L.Ed.2d 837, the United States Supreme Court stated:

> "* * * The federal habeas judge may in his discretion deny relief to an applicant who has deliberately bypassed the orderly procedure of the state courts and in so doing has forfeited his state court remedies.
>
> "* * * If a habeas applicant, after consultation with competent counsel or otherwise, understandingly and knowingly forewent the privilege of seeking to vindicate his federal claims in the state courts, *whether for strategic, tactical, or any other reasons that can fairly be described as the deliberate by-passing of state*

> *procedures,* then it is open to the federal court on habeas to deny him all relief if the state courts refused to entertain his federal claims on the merits—though of course only after the federal court has satisfied itself, by holding a hearing or by some other means, of the facts bearing upon the applicant's default. (citation omitted) At all events we wish it clearly understood that the standard here put forth depends on the considered choice of the petitioner. * * * " (emphasis added)

However, even assuming *arguendo* that petitioner has not waived the right to present this argument, it is the view of this Court that this argument that there was racial discrimination in the selection of the jury panel in petitioner's state court trial is without merit.

[12, 13] Petitioner's right to a trial by "impartial jury" is guaranteed, Ark. Const. Art. 2, § 10; and discrimination on the basis of race or ancestry in the selection of persons for service on grand or petit jury panels is clearly violative of the equal protection clause of the Fourteenth Amendment to the United States Constitution. Cassell v. Texas, 339 U.S. 282, 70 S.Ct. 629, 94 L.Ed. 839 (1950). The question of whether or not racial discrimination has been practiced in the selection of a jury panel is a question of fact, and it is the duty of a federal court to make independent inquiry into such alleged discrimination and determine whether a federal right has been denied. Bailey v. Henslee, supra, 287 F.2d at 943.

In Bailey v. Henslee, supra, Judge Blackmun discussed at length the alleged jury discrimination practiced in Pulaski County Circuit Court, enumerating some nine factors, and, on page 947 of 287 F.2d concluded:

"* * * Here there appears to be a definite pattern of race selection; here there is a device for race identification with its possibility of abuse; here there is exclusion from the alternate panels and from the special panels actually used; here there is an element of recurrence of the same Negro names; and here there is the additional factor, for what atmosphere it may provide, of exclusion from the civil divisions' panels."

It is the position of petitioner that the "racial discrimination in the selection of jurors in Garland County, Arkansas, presents a stronger case than the evidence presented in the Bailey case."

Few, if any, of the items enumerated by Judge Blackmun in Bailey appear in the selection of the jury which tried petitioner in state court. The regular jury panel present for the trial consisted of 27 people, two of whom were Negroes, and the alternate panel present also consisted of 27 people, seven of whom were Negroes. All of these jurors had been selected by three capable jury commissioners: Mr. Jeff Davis Bradley, a lifelong resident of Garland County and grocer in a rural community; Mr. Wayne R. Chitwood, a lifelong resident and local businessman who operated an automobile agency; and Mr. Darfus Henry, a local Negro businessman who operated a barber shop in the Negro business district of the City of Hot Springs. There had always been at least one Negro jury commissioner for the past few years.

According to the testimony of Mr. Darfus Henry, the Negro Jury Commissioner, the jury panel which served at petitioner's trial, and which was selected for the September 1961 term of the Garland County Court approximately two months before the crime was committed, was selected

by each jury commissioner making a list of names of persons who in the judgment of the respective jury commissioner were suitable for jury service.[11] The jury commissioner then checked the lists of names against the poll tax books in order to determine whether or not the prospective jurors were qualified voters.[12] Finally, the lists were checked against a list of jurors who had served within the past two years to make sure that they were not disqualified to serve for that reason.[13] Mr. Henry stated that he selected some of the Negroes on the jury panel and the other commissioners selected some more. This testimony was corroborated by the other two jury commissioners, Mr. Bradley and Mr. Chitwood.

The jury commissioners testified that they did not recall that the poll tax book furnished them had any racial designation of electors, *i. e.*, the letter "c". While they apparently are in error about this fact,[14] it certainly seems that in the procedure used by them in selecting the jury panel it fairly appears that the racial designation did not affect in any way their selection of the jurors who served on the jury panels.

The petit jury list from petitioner's state court trial reflects racial designations by the letter "c" following the names of some, but not all, of the Negroes on the list. The jury commissioners testified that this designation was not made by them. Mr. Sherlon Hilliard, the Circuit Court Clerk, could not state positively that he had placed the racial designations on the list but he did testify that he

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[11] Qualifications of jurors are generally set out in Ark.Stat.Ann. § 39-101—39-116 (1947).

[12] Ark.Stat.Ann. § 39-101 (1947).

[13] Ark.Stat.Ann. § 39-225 (1947).

[14] Ark.Stat.Ann. § 3-227(b) (1947) requires the racial designation on the poll tax records.

often so designated the race of the jurors listed *after the lists were prepared* because he nearly always had requests from the local newspapermen, as well as attorneys, as to the Negro jurors on the panel.

The jury commissioners further testified that they each selected Negroes, along with other prospective jurors, whom they knew and felt would be suitable for jury service, but that they made no special effort to acquaint themselves with other Negroes of Garland County who may have been qualified to serve as jurors. Petitioner points to this fact as evidence of discrimination and cites Cassell v. Texas, supra, wherein Mr. Justice Reed stated at page 289 of 339 U.S., at page 633 of 70 S.Ct., 94 L.Ed. 839. "When the commissioners were appointed * * * it was their duty to familiarize themselves fairly with the qualifications of the eligible jurors * * * *without regard to race and color.* * * * " (emphasis added)

Petitioner would lead this Court to believe that since the jury commissioners did not make a special effort to acquaint themselves with the qualified Negro electors, they did not discharge "their duty to familiarize themselves fairly with the qualifications of eligible jurors." This conclusion is a *non sequitur* since if the jury commissioners had singled out a particular group on the basis of race there clearly would have been a selection of jurors *with* regard to race instead of *without* regard to race. It is the view of this Court that in the selection of the jury empaneled to serve at the trial of petitioner's case, the language of Mr. Justice Reed in Cassell v. Texas, supra, was fulfilled to the letter and the spirit by the jury commissioners, Mr. Bradley, Mr. Chitwood and Mr. Henry, who each in their varied occupations had a wide acquaintance of Garland County, and by force of their varied occupa-

tions were reasonably familiar with the residents of Garland County, both those who were qualified electors and those not qualified; and, the Court is of the opinion that the jury commissioners did in fact select a jury panel "without regard to race or color".

It was clearly stated in Bailey by Judge Blackmun that "* * * Discriminatory selection in prior years does not nullify a present conviction if the selection of the jury for the current term is on a proper basis. 'Former errors cannot invalidate future trials.' [citing Brown v. Allen, 344 U. S. 443, 479, 73 S.Ct. 397, 418, 97 L.Ed. 469 (1953)]" Bailey v. Henslee, supra 284 F.2d at 943. However, in order to avail petitioner of every reasonable opportunity to establish the alleged jury discrimination, petitioner was permitted to introduce into evidence at the hearing on the instant petition copies of the jury records of Garland County, Arkansas, for the past 28 consecutive terms of the Garland County Circuit Court, dating from the March 1949 term to the September 1963 term. It would unduly burden this opinion to attempt to discuss in detail these records. It is the view of this Court that the exhibits summarizing these records do not establish the racial discrimination in the selection of the jury, as petitioner now argues.

[14] The figures compiled by petitioner, and quoted in his brief on page seven, indicate that almost 14% of the persons who served on the regular petit jury panels from March 1949 to September 1963 in the Garland County Circuit Court were Negroes. However, this figure is based on the number of Negroes so designated by race, and it is undisputed that not all Negro jurors were designated by race. Hence, even the figure of 14% represents slightly

less than the actual percentage of Negroes participating in jury service. Unlike many counties in Eastern Arkansas, Garland County is not heavily populated by Negroes. Petitioner established by the testimony of Mr. Floyd Bryan, an accountant in the Auditor's Office of the State of Arkansas, that the percentage of qualified Negro electors residing in Garland County has numbered from 10% to 11% over the years.

[15] Admittedly, proportional representation of races on a jury is not a constitutional requisite, Cassell v. Texas, supra at 286 of 339 U.S., 70 S.Ct. 629, 94 L.Ed. 839 and a disproportion in the number selected does not even establish racial discrimination in the selection of a jury. Bailey v. Henslee, supra, 287 F.2d at 942, citing Akins v. Texas, 325 U.S. 398, 403, 65 S.Ct. 1276, 89 L.Ed. 1692 (1945). Now, petitioner in support of his argument of jury discrimination urges this Court to consider statistics which reflect the proportionate number of Negroes available for jury service in comparison with the proportionate number of Negroes who actually served as jurors, *i. e.*, 10%—11% :14%. In short, a far greater proportion of qualified Negroes have served as jurors in Garland County for the past 28 consecutive terms of court than actually, in fact, reside there. Obviously, it does not follow from these statistics that Negroes have been racially discriminated against in the selection of jurors during this period.

Petitioner further argues that from these records covering 28 consecutive terms of court, there is a recurrence of Negroes on the juries, and this evidence of "repeaters" establishes a pattern of limiting the participation of Negro electors for jury duty. Undoubtedly, over a period of 28 consecutive terms there might be a recurrence of some

individuals serving as jurors, particularly in a county no larger than Garland County.[15] The fact that Mr. Darfus Henry, as well as Mr. Emmett Harris, served as a juror for three terms over his period of approximately fourteen years, and further that some Negroes from the same immediate family were called during the same term do not establish, as petitioner contends, any pattern of limiting the Negro participation in jury service. Petitioner has failed to furnish an accurate picture of the existence of repeaters generally, assumming there are others, as compared to Negro repeaters; and hence the significance, if any, of petitioner's statistics cannot be fairly determined. The proof falls far short of establishing what petitioner now argues in this regard.

IV. Alleged Unconstitutionality of the Arkansas Rape Statute

[16] Petitioner argues the unconstitutionality of the statute under which he was convicted. This statute, Ark. Stat. § 41-3403 (1947), provides in substance that any person convicted of rape shall suffer the punishment of death or life imprisonment. It is petitioner's contention that this statute has been so applied in Arkansas that Negro men who are convicted of rape upon white women "usually" receive the death sentence, whereas white men and Negro men who commit rape upon Negro women "usually" receive a lesser sentence than death. Thus, petitioner contends that Negro men are denied equal protection of the law, and cites Pace v. Alabama, 106 U.S. 583, 1 S.Ct. 637, 27 L.Ed. 207 (1882), and People v. Friedman, 341 U.S.

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[15] According to the statistics furnished by Mr. Floyd Bryan, an accountant employed in the State Auditor's office, the total number of qualified electors in Garland County was slightly less than 20,000 for each of the years 1957 and 1959.

907, 71 S.Ct. 623, 95 L. Ed. 1345 (1951), both of which were discussed briefly by the Arkansas Supreme Court when this argument was made on appeal and decided adversely to petitioner. Maxwell v. State, supra, 236 Ark. at 701 and 702, 370 S.W.2d at 117 and 118.

In the state court proceeding, prior to the trial, a hearing was held on petitioner's motion to declare Ark.Stat. § 41-3403 (1947) unconstitutional in its application. In support of its motion petitioner relied on the Arkansas State Penitentiary records of criminal executions from September 5, 1913 through October 28, 1960.[16] At the hearing held on the instant petition, petitioner was also permitted to introduce evidence from the Circuit Clerks, the Prosecuting Attorneys, and the Sheriffs of Garland, Jefferson, and Pulaski County, Arkansas, as to the number of rape prosecutions in these counties and the disposition of these prosecutions for the period of January 1, 1954, through January 1, 1964. Petitioner now relies on all of this evidence to establish the unconstitutionality of this statute, as alleged.

It would serve no useful purpose to discuss the exhaustive statistics compiled by petitioner regarding the rape prosecutions as shown by the records examined of the three counties. While the court records are complete, the information obtained from the prosecuting attorney's office and from the sheriff's office of these counties is not, due to the fact that such records for an extended period of time have not been preserved in these offices. However, considering all of the documentary evidence introduced by petitioner, as well as the testimony offered, and giving

[16] These statistics are detailed in the record and discussed fully by the Arkansas Supreme Court in Maxwell v. State, 236 Ark. 694, 701, 370 S.W.2d 113 (1963).

the petitioner every favorable inference reasonable from this evidence, it is the view of this Court that petitioner has failed to establish the unconstitutional application of Ark.Stat. § 41-3403 (1947).

[17] Assuming that it is true, as petitioner contends, that Negro men in these three counties for the period in question who were convicted for raping a white woman were sentenced to death, whereas white men and Negro men who allegedly raped Negro women were either not charged or given a lesser charge than rape, the fact remains that the choice of punishment in a capital case is within the province of the jury, Ark.Stat. Ann. § 43-2153 (1947). It is a matter of common knowledge that the legal defense of consent is always an obstacle to a rape prosecution and the moral character of the prosecuting witness is almost always in issue. The statistics compiled by petitioner represent a rather naive attempt to ascertain why a rape conviction was sought in one case and yet not in another. Petitioner apparently does not now contend that jury verdicts in rape prosecutions are based on racial discrimination, and there is certainly no evidence in the record to warrant this conclusion. On the contrary, each of the prosecuting attorneys called as a witness by petitioner stated under oath that they have prosecuted all cases, including charges of rape, without regard to race.

It is the view of this court that petitioner has failed to establish that Ark.Stat. § 41-3403 (1947) is unconstitutional in its application, as alleged. Ironically enough, petitioner and one Charles Franklin Fields, a white man whose conviction for the crime of rape under this statute was affirmed by the Arkansas Supreme Court in Fields v. State, 235 Ark. 986, 363 S.W.2d 905 (1963), were both scheduled to be executed at the Arkansas State Peniten-

tiary on January 24, 1964. Fields was executed on that day.

[18] Finally, petitioner has contended that the imposition of the death penalty on a charge of rape contravenes the Eighth and Fourteenth Amendments to the United States Constitution for the reason that such a penalty conflicts with the basic concepts of fairness and right to civilized societies. Petitioner relies solely on the dissenting opinion in the denial of certiorari by the United States Supreme Court in Rudolph v. Alabama, 275 Ala. 115, 152 So.2d 662 (1963), cert. denied 375 U.S. 889, 84 S.Ct. 155, 11 L.Ed.2d 119 (1963). Suffice it to say that the alleged unconstitutionality, on the theory advanced, must rest upon the pronouncement of the majority and not the dissent.

The petition will be denied.

Opinion of Supreme Court of Arkansas

WILLIAM L. MAXWELL,

Appellant,

v.

THE STATE OF ARKANSAS,

Appellee.

No. 5057

Supreme Court of Arkansas.

May 27, 1963.

OSRO COBB, Special Associate Justice.

1. This is a criminal case wherein appellant was charged, under Ark.Stat.Ann.1947, Sec. 41-3401, with the commission of the offense of rape. Prior to 1915 conviction for this offense carried a mandatory death penalty. By Act No. 187 of 1915 (Ark.Stat.Ann.1947, Sec. 43-2153) the mandatory death penalty was removed as to all capital offenses and the jury trying the accused was authorized to bring in a verdict of guilty and life imprisonment in the State penitentiary in lieu of the death penalty, if it so desired.

2. At the conclusion of this trial the court provided the jury with three forms of verdicts, as follows: (1) Not guilty; (2) Guilty with life imprisonment; (3) Guilty as charged. After several hours of deliberation the jury returned verdict No. 3, making the death sentence mandatory. Such a sentence was pronounced upon the appellant

on April 5, 1962. Execution of appellant has been stayed pending review of the case here on appeal.

[1] 3. We have painstakingly examined the entire record. We have considered on its merits every motion made on behalf of appellant and denied by the trial court and we have considered on its merits every objection interposed by counsel for appellant to which adverse rulings were made by the court. In capital cases the formal saving of exceptions to adverse rulings is unnecessary. Ark.Stat. Ann.1947, Sec. 43-2723.

I. Sufficiency of the Evidence

[2] The offense involved was committed on November 3, 1961. Within a matter of hours appellant was taken into custody. State and Federal authorities collaborated in a thorough investigation of the crime and on November 7, 1961, appellant was formally charged by the filing of a criminal information. Appellant makes no complaint as to the circumstances of his arrest or as to the promptness of the State's attorney in filing the information against him.

Miss Stella Spoon, age 35, lived with her aged and helpless father at 108 Nichols Street in the city of Hot Springs, in Garland County. Near 3:00 a. m. on November 3, 1961, she was aroused by an unusual noise. Clad only in her pajamas, she went into the living room. She saw the form of a man at the window engaged in cutting or breaking the screen. She warned the intruder to leave or she would call the police. The man kept trying to force the screen and she ran to her telephone in the same room to call the police. Almost in the same instant the man burst through the window. Miss Spoon had dialed the operator before she was violently seized and the receiver

knocked from her hand. The telephone operator, hearing the screams, connected the line to police headquarters, where an officer heard the screams and the struggle, traced the call, and dispatched officers to the scene.

Once inside the home, the intruder subjected Miss Spoon to a literal nighmare of brutality and abuse. She fought and struggled, but to no avail. She struck the intruder with a purse. When he forced his hand over her mouth to silence her screams she bit his finger, causing it to bleed. Her helpless father tried to aid her, but was struck and left bleeding. She tried to escape through the front door, but was caught. Her attacker kept threatening to kill her and her father as well. She was dragged and forced outside the house without shoes, and while clad only in her pajamas was forced to a remote spot some two blocks from her home, where battered, bruised, bleeding and exhausted she was overpowered and compelled against her will to suffer a deliberate and calculated rape of her person. After the ravage of her person had been accomplished, and before fleeing, her attacker threatened to kill her and her father if she told.

Testimony establishing the identity of appellant as the attacker is clear and emphatic. At the window he had a part of a nylon stocking on his head, with a knot in it. When he appeared to try to quickly jerk it down over his face it came off. A piece of nylon hose was found near the home of the victim and the FBI Laboratory at Washington, D. C., found in said nylon hose specimens of hair similar in every detail to that of appellant. A thread of nylon combed from appellant's head was found to be exact in all details with the threads of the hose found near victim's house. Negroid hair found in the home of the victim corresponded exactly with hair of appellant.

Officers working on the case were quick to note the fresh injury to appellant's finger and the condition of the clothes he was then wearing. Officers were dispatched to his mother's home, where appellant resided, and she was advised that her son was in trouble. They asked permission to examine his clothes and his mother consented thereto, taking the officers to the clothes closet and permitting them to take a change of clothes and also a blue coat and a trench coat belonging to appellant. The officers forwarded to the FBI Lab in Washington, D. C., the clothing removed from the person of the appellant, his blue suit coat, his trench coat; the victim's pajamas and the strands of hair, nylon thread and hose previously mentioned. The repeated and violent contact between the pajamas worn by the victim and the clothing of appellant left their telltale marks on both garments.

Robert Duckett, Special Agent, FBI Laboratory, whose qualifications were admitted as an expert on hairs, fibers, textiles and related materials, testified: "It has been my experience that when clothing comes in contact with other clothing or objects fibers will be interchanged or deposited. Now working on this assumption, I removed the foreign debris adhering to the T shirt that was submitted to me, the suit that was submitted to me, and the trench coat that was submitted to me * * * I mounted the foreign fibers and I compared those foreign fibers that I had recovered from the debris from the garments with the fibers composing the red pajamas. In the debris of the T shirt, in the debris of the suit coat and in the debris of the trench coat, I found red cotton fibers that matched the fibers composing the pajamas. * * *" He also testified in detail as to the matching hair and nylon thread and hose specimens examined as set out above.

Allison Simms, Special Agent, FBI Laboratory, whose qualifications as an expert in analysis of blood stains and body fluids were admitted, testified: "I was examining these articles for the purpose of blood stains and seminal stains. Seminal stains are stains which consist of semen and semen is the male reproductive fluid which contains the male reproductive cell. I examined the pajama bottoms and tested these stains chemically and determined that these reddish brown stains consisted of blood—human blood. In the crotch of the pajamas I identified seminal stains—also on the front portion of both legs of the trousers I identified seminal stains which contained spermatozoa. On the shirt I did not find any semen but there were blood stains present which were human blood. • • •"

Miss Spoon struggled with her unmasked attacker in the light of her living room and having never seen him before made a special effort to remember his face. She testified:

> "Q. Is that the man? (indicating appellant, then standing to be observed by the witness)
> "A. Yes, sir, it is.
> "Q. Is there any possible doubt in your mind?
> "A. No, sir."

Dr. James H. French (professional qualifications admitted by appellant) examined the victim shortly after the crime in the emergency room of a Hot Springs hospital. He testified: "The patient had numerous bruises, cuts about her person. She had the undersurface of her left toe torn, the greater part of the skin was torn. She had a bruise on her right hip, both wrists had abrasions circling the wrist, she had bruises of both forearms, she had a

bruise and swelling of the lower lip, she appeared emotionally upset. I did an internal examination and obtained a smear from the mouth of the womb and found living spermatozoa of the male germ cells in the secretion."

The evidence in this case met in overwhelming fashion all of the requirements for conviction for the offense of rape (Ark.Stat.Ann.1947, Sec. 41-3402). McDonald v. State, 225 Ark. 38, 279 S.W.2d 44.

II. Motion to Quash Information

[3] This criminal information was filed under authority of Amendment No. 21 to the Constitution of Arkansas. Appellant requested and was granted additional time by the court in which to enter his plea to the charge. A bill of particulars was provided appellant and his counsel, no objection being interposed thereto. After arraignment and plea of not guilty appellant requested and was given additional time in which to prepare his defense. When appellant was finally placed upon trial he and his counsel knew with particularity the exact nature of the charge. Counsel for appellant and appellant were present in open court on February 5, 1962, when the motion for continuance was granted and an agreed trial date of the case, beginning on March 19, 1962 was set. No additional time was requested for preparation for trial. Hearings on preliminary motions were ended on March 16, 1962, and the court at that time asked counsel for appellant if there was any reason why the trial could not commence on March 19, 1962, as set, and was advised "The defense will be ready." The rights of the accused were fully protected. This Court and the Supreme Court of the United States have many times held such prosecutions by information valid. Wash-

ington v. State, 213 Ark. 218, 210 S.W.2d 307; Moore v. State, 229 Ark. 335, 315 S.W.2d 907, cert. denied, 358 U.S. 946, 79 S.Ct. 356, 3 L.Ed.2d 353; Hurtado v. Cal., 110 U.S. 516, 4 S.Ct. 111, 28 L.Ed. 232; Gaines v. Washington, 277 U.S. 81, 48 S.Ct. 468, 72 L.Ed. 793; Adamson v. California, 332 U.S. 46, 67 S.Ct. 1672, 91 L.Ed. 27. Denial of the motion of appellant to quash was proper.

III. Motion to Declare Statute Unconstitutional in Application

[4] In this motion appellant concedes that our penalty statute for rape (Ark.Stat.Ann.1947, Sec. 41-3403) is not unconstitutional on its face, but contends that in its application to appellant and all other members of the Negro race it is unconstitutional for the reason that in Arkansas it is the practice and custom of juries to impose the death penalty upon Negro men who rape white women, without inflicting the same punishment upon other offenders. The court heard evidence on the motion. Lee Henslee, Superintendent, Arkansas State Penitentiary, testified, on call by appellant, that between the dates of September 5, 1913, and October 28, 1960, the records of the penitentiary reflected that there had been 168 executions, broken down by charge and race as follows:

Negro for rape	19	Negro for murder	108
White for rape	1	White for murder	38
		Indian for murder	2

This bare listing of the number of executions does not pretend to cover the total number of such offenses by race or otherwise, nor does it cover trials resulting in acquittals, imposition of life sentences, or cover the intervention of

executive clemency.[1] Certainly there was no evidence offered even remotely suggesting that the ratio of violent crimes by Negroes and Whites was different from the ratio of the executions. There was no testimony suggesting that the State's attorneys in the various judicial districts had not been asking for the death penalty in their prosecutions for rape, whether the accused be black or white. In any event, the jury alone could determine the death penalty. The attack therefore appears to be directed against trial by jury.

We have carefully reviewed the decisions of the Supreme Court of the United States cited by appellant in support of his position. We comment briefly as to same. Pace v. Alabama, 106 U.S. 583, 1 S.Ct. 637, 27 L.Ed. 207. Here an Alabama statute was upheld as not in conflict with the Constitution of the United States, although it prescribed penalties more severe for adultery between persons of different races than for members of the same race. And in Friedman v. People, 341 U.S. 907, 71 S.Ct. 623, 95 L.Ed. 1345, the case was dismissed upon motion for want of a substantial Federal question. Yick Wo v. Hopkins, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220. In this case it was admitted that discrimination was being practiced against certain persons (Chinese) in denying them permits to operate laundries, although possessed of all qualifications set forth in the city ordinance under review. Smith v. Texas, 311 U.S. 128, 61 S.Ct. 164, 85 L.Ed. 84, is one of

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[1] Most of the opinions of this Court do not identify the race of the defendant, and it is impossible to obtain accurate information without reviewing the transcripts, which may or may not reflect the race of the accused. Appellant has listed only one execution of a white man for rape (which happened a few years ago), and this Court, only a few months ago, affirmed the conviction of another white man, with death penalty, on this charge. See Fields v. State, 235 Ark. 986, 363 S.W.2d 905.

several cases involving discrimination as to race in jury service. Lane v. Wilson, 307 U.S. 268, 59 S.Ct. 872, 83 L.Ed. 1281, involved abuses in voter registration. Chambers v. Florida, 309 U.S. 227, 60 S.Ct. 472, 84 L.Ed. 716, is a criminal case where the conviction was reversed because of long days of confinement and mistreatment before the filing of charges and where confessions were obtained by coercion.

We fail to find any support in the above cases for appellant's position. Striking down our criminal statutes as to a large segment of the population upon the tenuous grounds urged by appellant is illogical. It could only result in chaos in the difficult job of law enforcement for the protection of the people. This Court concurs emphatically with other appellant courts of the United States in holding that justice should be administered equally and fairly as to all citizens regardless of race or color. Our penal statute for rape applies equally to all citizens of all races. On the record before us we find no basis whatever to declare our penal statute for rape unconstitutional in any respect of verbage or application. Appellant's motion was properly overruled.

IV. Motion for Change of Venue

[5, 6] The burden was on appellant (Ark.Stat.Ann.1947, Sec. 43-1502) to make credible proof to support his motion. A hearing was had. All of the witnesses called by counsel for appellant testified squarely against his position. Incidentally, we note here that in appellant's listing of executions for rape that not a single such case appears to have originated from Garland County, where this case was tried. There was no abuse of discretion by the trial court in overruling the motion for change of venue. Speer v. State, 130

Ark. 457, 198 S.W. 113; Adams v. State, 179 Ark. 1047, 20 S.W.2d 130.

V. Motion to Remove to Federal Court

[7] Ordinarily such motions are filed directly in Federal Court. No cause was shown justifying such removal, and the trial court properly refused to surrender its jurisdiction. Rand v. State, 191 F.Supp. 20 (D.C., Ark., 1961).

VI. Objections Relating to Voir Dire

[8] The trial court had the advantage of observing and appraising the demeanor and answers of all prospective jurors. He allowed appellant's counsel the greatest latitude in examining the jurors before they were approved by the court for duty in the case. Indeed, we think the court proceeded in an exemplary manner in securing a jury free from actual or implied bias or prejudice. The objections of appellant concerning the selection of the jury were properly overruled. Polk v. State, 45 Ark. 165; Maroney v. State, 177 Ark. 355, 6 S.W.2d 299; 50 C.J.S. Juries § 275 a(1).

VII. Objections as to Limitations of Examination of Witnesses

[9] We find from the record that the court conducted the trial of this case in such a manner as to provide counsel for appellant every reasonable and legitimate latitude in cross-examination of witnesses—no witnesses having been put on by appellant. All objections of this character are found to be without merit and properly overruled.

VIII. APPELLANT'S VARIOUS MOTIONS TO EXCLUDE ALL EVIDENCE ADDUCED BY PROSECUTION CONCERNING ITEMS OF CLOTHING AND OTHER MATERIALS EXAMINED AT FBI LABORATORY, WASHINGTON, D. C.

[10] When the police authorities sent in for examination the clothing of appellant, the pajamas of the victim, and the other items, as previously mentioned, such action could have helped to exonerate appellant rather than help to convict him, depending upon the findings at the laboratory. In this case the findings pinpointed the guilt of appellant.

The clothing removed from the person of appellant as an incident of his arrest for the crime under investigation was properly obtained. Jones v. U. S., 357 U.S. 493, 78 S.Ct. 1253, 2 L.Ed.2d 1514; Drayton v. U. S., 5 Cir., 205 F.2d 35.

[11] As to items taken from the home of appellant's mother, with whom appellant resided, the evidence clearly shows that the mother not only consented to the search, but assisted the officers in same. She was present at the trial but did not testify. Neither was a motion filed to quash the evidence obtained at the home. The proof by the State met the burden upon the State in proceeding as it did without a search warrant. Rigby v. U. S., 101 U.S. App.D.C. 178, 247 F.2d 584; Cantrell v. U. S., 5 Cir., 15 F.2d 953, cert. denied, 273 U.S. 768, 47 S.Ct. 572, 71 L.Ed. 882.

"The consent of a householder to the search of the house dispenses with the necessity for a search warrant, * * * where his mother, with whom defendant was living, consented to the search, though defendant objected to the

search of his room." Gray v. Commonwealth, 198 Ky. 610, 249 S.W. 769.

[12] The right to object to evidence on ground of illegal seizure is waived unless there is a timely motion to suppress the evidence. Morton v. U. S., 79 U.S.App.D.C. 329, 147 F.2d 28, cert. denied, 324 U.S. 875, 65 S.Ct. 1015, 89 L.Ed. 1428; Butler v. U. S., 10 Cir., 153 F.2d 993. No motion to suppress was filed as to any item sent to the FBI Laboratory

[13] Lieutenant Crain was examined and cross-examined concerning a blue coat obtained at the home, without any objection being made as to the admissibility of such evidence. The admissibility of said evidence was waived. Sandusky v. Warren, 177 Ark. 271, 6 S.W.2d 15.

[14] The objections stated by counsel for appellant to the items sent to the FBI Lab were always made in blanket or in all inclusive form, with no breakdown as to any given item. Such objections are of no avail where any one of several items covered in the blanket objection was lawfully and properly obtained. Eureka Oil Co. v. Mooney, 173 Ark. 335, 292 S.W. 681; Haney v. Caldwell, 35 Ark. 156; Martin v. Monger, 112 Ark. 394, 166 S.W. 566.

Appellant, in his various motions to strike all evidence introduced concerning the articles sent to the FBI Laboratory, has relied almost exclusively upon Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed. 2d 1081, a leading case in which judicial developments as to search and seizure were reviewed comprehensively. In the Mapp case, Dollree Mapp was within her own home. Officers appeared and demanded admittance. She refused because they did not produce a search warrant. After some three hours, and without a search warrant, the officers forcibly entered the home,

searching for and obtaining evidence in the form of lewd photographs, subsequently used in evidence. There is no similarity of facts in the instant case with the Mapp case, supra, and the action of the Supreme Court of the United States in reversing Mapp v. Ohio, supra, is inapplicable here.

[15] The items in question, examined by the FBI Lab, were in court during trial, in their original containers from the FBI. They were described in detail in oral testimony of witnesses who had been in custody of or had examined same at the laboratory. The items were not passed to the jury for personal inspection nor were they listed as formal exhibits to the oral testimony adduced concerning same. The direct examination of FBI Special Agent Duckett; his cross-examination and the direct examination of FBI Special Agent Simms had been completed before any objection was made seeking to strike all of their testimony. Counsel for appellant in making an objection told the court that the articles themselves had been introduced in evidence, although improperly. The crux of the evidence as to the items given laboratory examination was the findings as to the stains, body fluids, similarity of hairs, nylon thread, etc. This evidence was susceptible, absent a stipulation of counsel, to introduction solely in oral form. Even if it had been possible to conduct the laboratory tests in the presence of the jury, such testing would have been worthless as evidence without oral testimony explaining the results and findings.

[16] Physical objects explained to the jury may be used in presenting evidence without formal introduction. Meyer v. State, 218 Ark. 440, 236 S.W.2d 996; Gordy v. State, 159

Tex.Cr.R. 390, 264 S.W.2d 103; Underhill Criminal Evidence, 5th Ed., Sec. 110.

In Featherston v. Jackson, 183 Ark. 373, 36 S.W.2d 405, this Court said: "On the trial a rough sketch, or map, showing tracks or ruts in highway was used by appellee in examining his witnesses. Appellant objected to use of said map. It was not introduced in evidence, but the day after the trial was over, he filed a motion to require appellee to file the map. This came too late and the court correctly denied the motion."

At no time in this case did appellant ask for the formal introduction into evidence of the items examined by the FBI Laboratory.

We therefore conclude that the trial court did not commit error in refusing to strike the testimony of the special agents of the FBI. All other motions of appellant to strike testimony were likewise properly denied.

IX. Instructions

[17] Appellant complains that certain instructions requested by him were not given. An examination of the record discloses that the subject matter of such requested instructions was fully covered in other instructions given by the court. We have consistently held that it is not error to refuse an instruction where the matters are fully covered by instructions already given. Griffin v. State, 210 Ark. 388, 196 S.W.2d 484.

X. Argument of Counsel

[18] Appellant objected to the following remarks of the prosecuting attorney during argument:

"* * * He could have choked her to death as easily as not.

> * * * He could have had a knife in his pocket and pulled it out and she did tell you, I believe, that he had some instrument when he was breaking in the screen. He could have pulled a knife out of his pocket and cut her throat from ear to ear.
>
> "The Court: He is referring to why she was in fear of her life. Your motion is overruled."

Once inside the home of the victim appellant had access to all the kitchen knives and other possible weapons therein. He repeatedly threatened to kill both the victim and her father. Under the proof in the case we see no impropriety in the ruling of the court.

In his opening statement counsel for appellant stated:

> "It is the position of the Defense, and the Defense will prove, both by cross-examination of the witnesses that the State will call and by evidence that it will produce itself that this alleged crime as described by Mr. Whittington could not, and in fact did not take place as he stated. * * * That if in fact an assault did take place that certainly it was not rape, that if any assault did take place it was free and voluntary on her part. I think you will find that the evidence as adduced here in the Court, both the evidence produced by the prosecution and by the evidence adduced by the defendant that if in fact an assault did take place it was a free and voluntary act. * * * "

An objection was made during closing argument of prosecution and is set out as follows:

> "Mr. Whittington: May it please the Court, ladies and gentlemen, when the counsel for the defense made

his opening statement he told you that he would prove to you that this matter did not take place as I had told you in my opening statement, that it was a free and voluntary act, and he would prove that it was a free and voluntary act on the part of Stella Spoon. Now, ladies and gentlemen—

"The Court: One moment, Mr. Whittington, Mr. Mercer wants to interpose an objection.

"(Out of hearing of the Jury)

"Mr. Mercer: Court please, I object to the prosecuting attorney in his argument to the Jury talking about anything the defendant has to prove because the defendant doesn't have to prove anything.

"The Court: Well, he is repeating what you said in your opening statement. I think he has a right to refer to it and comment on it.

"Mr. Mercer: Court please, it is not incumbent upon the defendant to prove anything.

"The Court: I understand.

"(Mr. Whittington continues argument:)

"Now, ladies and gentlemen, while it is not incumbent upon the defendant to prove anything, the defendant's attorney got up here and he told you they were going to prove some things. They don't have to prove anything, I am the one that has to prove the case, let's get that clear. The Court so instructed you. But he told you what all he was going to prove and I am still waiting to hear any of that proof. I haven't heard a word of it. We have people who must have known where the defendant was that night, if he wasn't where he was supposed to be, I haven't heard any of them say he wasn't there. * * *"

Remarks of the prosecuting attorney were well within proper limits, and we find no error in same. Ark. Power & L. Co. v. Hoover, 182 Ark. 1065, 34 S.W.2d 464; Culbreath v. State, 96 Ark. 177, 131 S.W. 676.

XI. SUMMARY

The verdict reached and the sentence imposed do not appear to offend the Constitutions of the State of Arkansas or of the United States; the statutes of Arkansas and decisions heretofore rendered by this Court. Appellant received a fair and impartial trial in every respect.

Judgment is affirmed.

HOLT, *J.*, disqualified and not participating.